Article

# Who Owns the Kurils? The Question of Territorial Sovereignty Arising from the Kuril Islands Dispute

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## Abstract

The Kuril Islands are a group of volcanic islands that stretch between Hokkaido in Japan and Kamchatka in Russia. They are the subject of an ongoing territorial dispute between Russia and Japan, which is largely rooted in historical developments which took place during the closing chapters of the Second World War. There are several legal questions which arise from the dispute between Russia and Japan pertaining to the establishment of territorial sovereignty. These questions are whether a term within the Yalta Conference Agreement lawfully gave a right to the USSR to the sovereign territory of Japan, in the absence of Japanese consent. Whether the USSR had violated international law by annexing the Kuril Islands. Whether Japan still had a lawful claim to the Kuril Islands after the conclusion of the Treaty of San-Francisco, and whether the islands claimed by Japan do indeed form part of the Kuril Islands. This article analyses each of these questions in order to determine whether sovereignty has in fact been lawfully established by Russia over the Kuril Islands and whether Japanese territorial claims have any merit in international law.

**Keywords**: Kuril Islands; Russia; Japan; International Law; Territorial Dispute; Sovereignty; Interpretation of Treaties

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## Background

Japan claims several islands in the Kuril archipelago: Iturup, Kunashir, Shikotan, and the Habomai islets.[1] These islands have been administered as part of Russia since 1945, when the USSR annexed the entire Kuril archipelago from Japan during the final days of the Second World War. The contemporary territorial dispute has its origins in this historical annexation. Russia continues to deny the validity of Japanese claims, and consequently, to date the matter has not been brought before the ICJ due to an unwillingness by Russia to consent to the jurisdiction of the court over the dispute.

At the heart of any territorial dispute is the issue of competing sovereignties over the same geographic territory. Territorial sovereignty is the right of a state to exclusively exercise the functions of a state over its own territory.[2] These functions include the establishment of judicial, legislative, and executive authority over subjects within a defined territory.[3] Establishing territorial sovereignty is a challenge for a state, because it requires a state to exercise exclusive authority over a territory.[4] There are several avenues through which sovereignty can be lawfully established under international law. Russia's assertion of sovereignty over the Kuril Islands is rooted in two secondary modes of acquisition of ownership: conquest, and in the alternative, prescription. In order to understand the Russian and Japanese positions, due consideration must be given to the timeline of changing sovereignty over the Kuril Islands.

The first legal division of the Kuril Islands between Russia and Japan was determined by the Treaty of Shimoda in 1855.[5] The border was drawn north of the island of Etorufu (presently Iturup) and south of the island of Urup. All the islands south of Urup were considered Japanese territory, and all the islands to the north of Etorufu were considered Russian territory.[6] In 1875, Russia and Japan concluded the Treaty of St Petersburg.[7] The treaty ceded the entire Kuril archipelago to Japan.[8] Japanese territorial sovereignty was thus de jure over the entire Kuril archipelago, extending to every island in the volcanic arc north of Hokkaido and south of Kamchatka.

On 11 February 1945, the Yalta Conference Agreement was signed by the USA, the UK, and the USSR.[9] Section 3 of the 'Agreement Regarding Japan' as contained within

1 Ministry of Foreign Affairs of Japan, 'Northern Territories Issue' (1 March 2011) <https://www.mofa.go.jp/region/europe/russia/territory/overview.html> accessed 27 October 2021.
2 Malcolm Shaw, *International Law* (5th edn, Cambridge University Press 2003) 411–412.
3 Angelo Dube, 'Of Neighbours and Shared Upper Airspaces: the Role of South Africa in the Management of the Upper Airspaces of the Kingdoms of Lesotho and Swaziland' (2015) CILSA 224.
4 Arbitrator Max Hubert in the *Island of Palmas* case, Permanent Court of Arbitration, 2 R.I.A.A. 829 at 838.
5 The Treaty of Commerce and Navigation between Japan and Russia, 1855.
6 ibid Art 2.
7 The Treaty of St Petersburg, 1875.
8 ibid Art 2.
9 The Yalta Conference Agreement, 1945.

the Yalta Conference Agreement, stated that 'the Kurile Islands [sic] shall be handed over to the Soviet Union'.[10] On 5 April 1945, the USSR issued a statement that denounced the Soviet-Japanese Neutrality Pact which had been concluded on 13 April 1941 between the USSR and Japan.[11] On 18 August 1945, the USSR invaded and occupied all the islands in the Kuril archipelago after having declared war on Japan ten days earlier.[12] On 8 September 1951, Japan signed the Treaty of San-Francisco, in which it prima facie renounced all 'right, title, and claim to the Kurile Islands [sic]'.[13] Despite this, Japan continues to claim the islands of Iturup, Kunashir, and Shikotan, as well as the Habomai islets.[14]

## Legal Problems Pertaining to the Dispute

There are several legal problems that flow from the historical developments listed above, and this paper pays due consideration to these problems in order to answer the question of whether Russia successfully established sovereignty over the Kuril Islands, and whether Japanese territorial claims have any merit in international law.

The first problem is that the USSR relied on the terms of the Yalta Conference Agreement as the legal basis to justify its annexation of the Kuril archipelago under international law.[15] The Russian Federation, as the successor state of the USSR, has continued to rely on the Yalta Conference Agreement as the legal basis for its exercise of sovereignty over the Kuril Islands.[16] The issue with the inclusion of this term in the Treaty,[17] is that the territory in question was within the sovereign domain of Japan at the time the Treaty was concluded.[18] Japan was not represented at the Yalta Conference, nor did it consent to the inclusion of this provision in the Yalta Conference Agreement.[19] In its essence, the USSR relied on the presumption that a multilateral treaty (Yalta

10 ibid.

11 The Department of State Bulletin Vol. XII, No. 305 (1945) in Yale Law School, 'Soviet Denunciation of the Pact with Japan' (The Avalon Project 2008) <https://avalon.law.yale.edu/wwii/s3.asp> accessed 27 October 2021.

12 David Glantz, 'August Storm: The Soviet 1945 Strategic Offensive in Manchuria' (1983) xvii.

13 Treaty of Peace with Japan (and two declarations), Art 2 (c).

14 'Northern Territories Issue' (n 1).

15 James Brown, *Japan, Russia, and their Territorial Dispute: The Northern Delusion* (Routledge 2016) 19.

16 The Ministry of Foreign Affairs of the Russian Federation, 'Briefing by Foreign Ministry Spokeswoman Maria Zakharova, Moscow, September 3, 2020' (3 September 2020) <https://www.mid.ru/en/web/guest/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/4309873> accessed 27 October 2021.

17 Section 3 of the chapter titled the 'Agreement Regarding Japan' in the Yalta Conference Agreement, 1945.

18 The Kuril Islands had not undergone any change in sovereignty since the conclusion of the Treaty of St Petersburg in 1875.

19 Irène Couzigou, 'Yalta Conference' (Max Plank Encyclopaedia of International Law 2016).

Conference Agreement) gave it a right to the territory of a third-party state without that state's consent.

The second problem is that Japan accused the USSR of having breached the Soviet-Japanese Neutrality Pact, and of violating international law by invading and subsequently occupying Japanese territory.[20] Russia alleges that the USSR's denunciation of the Pact amounted to a lawful termination of the Pact on the basis of a fundamental change in circumstance and maintains that the USSR's subsequent annexation of the Kuril Islands was lawful.[21]

The third problem is that prima facie, in terms of Article 2(c) of the Treaty of San-Francisco, Japan renounced its right, title, and claim to the Kuril Islands.[22] The Treaty did not, however, recognise the sovereignty of the USSR over the Kuril Islands, and the USSR refused to sign the Treaty of San Francisco.[23] Furthermore, the USA included a declaration in the treaty, prior to it entering into force, that seemingly contradicts the implication of Article 2(c).[24] The fourth problem is that Japan has alleged that the islands it claims do not constitute part of the Kuril Islands, as contemplated in the Treaty of San Francisco.[25]

## Is Section 3 of the 'Agreement Regarding Japan' as contained within the Yalta Conference Agreement lawful?

### The Yalta Conference Agreement

The Yalta Conference Agreement can be considered a *sui generis* treaty since its terms can only be understood within the historical context of the Second World War. The treaty was filled with terms and clauses that dictated the fate of entire nations, by reforming their governments and demarcating their international borders.[26] The issue regarding Japanese territory was however unique within the treaty, because it concerned the territorial integrity of a third-party state whom the USSR was not at war with at the time of the treaty's conclusion,[27] and furthermore, placed an obligation on Japan to cede territory to the USSR without first obtaining Japan's consent.[28] This part of the Treaty

20 'Northern Territories Issue' (n 1).

21 The Ministry of Foreign Affairs of the Russian Federation, 'Comment by the Information and Press Department on the Information Campaign Launched in Japan over the 75th Anniversary of the USSR's Entry into War against Japanese Militarism' (12 August 2020) <https://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/4282880> accessed 27 October 2021.

22 The Treaty of Peace with Japan (and two declarations) 1951.

23 ibid, first declaration.

24 ibid.

25 'Northern Territories Issue' (n 20).

26 The Yalta Conference Agreement, Art 3.

27 The Yalta Conference Agreement was signed on 11 February 1945, and the Soviet-Japanese War only started on 9 August 1945.

28 Japan was not a signatory to the Yalta Conference Agreement and did not accede to it at a later stage.

is reminiscent of similar provisions within treaties of the same era, namely, the Molotov-Ribbentrop Pact of 1939 between the German Reich and the USSR,[29] which gave the USSR and the German Reich 'rights' to the territory of several eastern European countries, namely Poland, which neither state was at war with at the time the Treaty was concluded.[30]

If the Yalta Conference Agreement had been concluded after the adoption of the Vienna Convention,[31] it would have been considered null and void in so far as it affects non-signatory states. This would be due to the fact that there is non-compliance with the principle of free consent, as codified in Article 9(1) of the Vienna Convention.32 Therefore, the question is: can the term in this treaty that supposedly created a 'right' for the USSR to sovereign Japanese territory be considered lawful prior to the adoption of the Vienna Convention?[33] The Vienna Convention states that 'the rules of customary international law will continue to govern questions not regulated by the present Convention.'[34] Considering that the Vienna Convention does not have retroactive effect,[35] the customary international law position will prove authoritative. In terms of customary international law, the *res inter alios acta* rule means that any term of a treaty which negatively affects the rights of a third party is unlawful.[36] Additionally, the *pacta tertiis* rule states that terms in a treaty cannot lawfully place obligations on third parties.[37] It can be argued that this term in the Yalta Conference Agreement relating to Japan would have also been considered unlawful on the basis of contravening these customary rules.

## Did the USSR Violate International Law by Annexing the Kuril Islands?

### The Soviet-Japanese War

Prior to the Soviet-Japanese War, the USSR had signed a non-aggression pact with Japan on 13 April 1941 known as the Soviet-Japanese Neutrality Pact.[38] The contents

29 Treaty of Nonaggression Between Germany and the Union of Soviet Socialist Republics, 1939.

30 The 'secret protocol' in the Molotov-Ribbentrop Pact partitioned Polish sovereign territory into German and Russian spheres of influence, respectively, that were later annexed by those states.

31 The Vienna Convention on the Law of Treaties, 1969.

32 Article 9(1) stipulates that the adoption of the text of a treaty takes by the consent of all the states participating in its drawing up, unless Art 9(2) applies. Regardless, a state cannot be bound by a treaty which it has not freely consented to.

33 Section 3 of the chapter titled the 'Agreement Regarding Japan' in the Yalta Conference Agreement, 1945.

34 The Vienna Convention on the Law of Treaties, 1969.

35 The Vienna Convention on the Law of Treaties, Art 4.

36 Malgosia Fitzmaurice, 'Third Parties and the Law of Treaties' (Max Plank Encyclopaedia of International Law 2002) 38–39.

37 ibid.

38 Volke Krause and David Singer, 'Minor Powers, Alliances, and Armed Conflict: Some Preliminary Patterns' in E Reiter and H Gärtner (eds), *Small States and Alliances* (Physica 2001) 13.

of the non-aggression pact promised that both countries would maintain peaceful and friendly relations for the next five years and would 'respect the territorial integrity and inviolability of the other Contracting party.'[39] The existence of this treaty is significant because during this era, war was still partially accepted under international law as a tool for resolving disputes between nations.[40] In accordance with the doctrine of intertemporal law, a juridical fact must be determined in accordance with the law contemporary to it.[41] Whether or not international armed conflict was considered lawful during the 1940s must thus be determined with reference to the customary international law applicable at the time. Non-aggression pacts served integral roles as regulators of international peace during and prior to the 1940s, by setting out clear legal obligations for signatory states to maintain peaceful relations between them.[42] The five-year non-aggression pact signed by the USSR and Japan would have been in effect until its natural expiration on 13 April 1946, unless it was extended in terms of the agreement.[43]

On 5 April 1945, the USSR denounced the Soviet-Japanese Neutrality Pact.[44] On 9 August 1945, the USSR declared war on the Empire of Japan.[45] The question of whether this declaration of war constituted a breach of the non-aggression pact depends on whether the USSR had lawfully terminated the Soviet-Japanese Neutrality Pact on 5 April 1945, as alleged by Russia.[46] Russia argues that the denunciation of the non-aggression pact terminated it, because 'circumstances had undergone a major change' since the conclusion of the non-aggression pact.[47] This argument is based on the customary legal doctrine of *rebus sic stantibus* ('things remaining as they are') that allows a party to render a treaty void on the basis of a fundamental change in circumstances.[48] According to the ICJ's decision in the *Fisheries Jurisdiction* case,[49] a state invoking the doctrine of *rebus sic stantibus* with regards to a change in circumstance would have to prove a 'radical transformation of the extent of the obligations still to be performed. The change must have increased the burden of the obligations still to be performed. The change must have increased the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that originally undertaken'.[50] Furthermore, these changed

39 The Soviet-Japanese Neutrality Pact, Art 1.
40 The Covenant of the League of Nations, Art 12.
41 *Island of Palmas* case (*USA v The Netherlands*) (1928) 2 RIAA.
42 Krause and Singer (n 38) 13.
43 The Soviet-Japanese Neutrality Pact, Art 3.
44 The Department of State Bulletin Vol. XII (n 11).
45 David Glantz, 'August Storm: The Soviet 1945 Strategic Offensive in Manchuria' (1983) xvii.
46 The Ministry of Foreign Affairs (n 21).
47 ibid.
48 Rebecca Wallace and Olga Martin-Ortega, *International Law* (8th edn, Sweet & Maxwell, 2016) 290–291.
49 *Fisheries Jurisdiction* case (*United Kingdom v Iceland*) (1973) ICJ Rep. 3.
50 ibid 21.

circumstances could not have been envisioned or contemplated by the parties to the treaty at the time when the treaty was concluded.[51]

Russia argues that this change in circumstance came about because 'Japan had rendered aid to Nazi Germany in fighting against [Russia]'.[52] In order for this argument to succeed in light of the *Fisheries Jurisdiction* case, Russia would have to prove that Japanese aid to the German Reich had radically transformed the extent of the obligations still to be performed after the conclusion of the non-aggression pact. The Soviet-Japanese Neutrality Pact placed negative obligations on the USSR and Japan to respect the territorial integrity of each other,[53] and to remain neutral in the event that one of the signatories became the object of hostilities.[54] Japanese aid to the German Reich was severely limited and had existed prior to the German invasion of the USSR.[55] It would be difficult to argue that any circumstances had actually changed following the conclusion of the non-aggression pact, or that the limited aid given to the German Reich by Japan radically transformed the USSR's ability to abide by the negative obligations imposed on it by the non-aggression pact. By utilising this train of thought, Russia would essentially be arguing that the USSR was 'forced' to go to war with Japan as a result of Japanese aid to the German Reich, which would in turn have to be proven. Russia would have a stronger argument if it merely insisted that the rendering of any economic aid to a hostile foreign power, no matter how trivial, constitutes a breach of neutrality. If this argument were to succeed, then Japan would have violated Article 2 of the Soviet-Japanese Neutrality Agreement, resulting in material breach of its terms.[56] Russia can then rely on the USSR's denunciation of the treaty as evidence that it, as the 'innocent' party, had elected to terminate the treaty due to Japan's material breach thereof.[57]

*Characterising the Soviet-Japanese War as War of Aggression*

Historically, a state could legally establish sovereignty over a territory that belonged to another state if they occupied their territory in part or in totality, and intended to retain it.[58] As of 1920, the Covenant of the League of Nations attempted to dissuade members from waging war with each other, by placing several preconditions on countries involved in disputes with each other before they could legally enter into an international armed conflict.[59] One such precondition was mandating compulsory arbitration before

51 Wallace and Martin-Ortega (n 43) 291.
52 The Ministry of Foreign Affairs (n 21).
53 The Soviet-Japanese Neutrality Pact, Art 1.
54 ibid Art 2.
55 Ian McLaren, *Nazi Germany and Imperial Japan: The Hollow Diplomatic Alliance* (Routledge 2017) Ch 4.
56 Wallace and Martin-Ortega (n 43) 289.
57 ibid.
58 Wallace and Martin-Ortega (n 43) 109.
59 Covenant of the League of Nations, Art 12.

engaging in a conflict.[60] In the late nineteenth and early twentieth centuries, respectively, treaty law also helped to erode the legality of territorial acquisition through conquest. One example is the Convention for the Pacific Settlement of International Disputes (Hague I) in 1899,[61] which obligated signatories to seek the peaceful settlement of all international differences arising between them.[62] Another example is the Kellogg-Briand Pact in 1928.[63] The Kellogg-Briand Pact placed obligations on signatory members not to settle disputes through the use of force, and renounced war as an instrument of foreign policy.[64] Consequently, by 1945, it is probable that conquest was no longer a valid secondary mode of acquiring territory under international law.[65] It should be noted that the Russian Empire was a signatory to Hague I,[66] and the USSR acceded to the Kellogg-Briand Pact.[67] It can be argued that the USSR did not inherit the obligations of Hague I under international law, because of its status as the successor state of the Russian Empire.[68] It is the customary legal position that a successor state starts with a 'clean slate' in respect of its treaty obligations.[69] The clean slate theory holds that a successor state can choose whether it wishes to be bound by the terms of a treaty that its predecessor state entered into, with the exception of treaties *in rem*, in which case the successor state will automatically be bound.[70] Hague I was not a treaty *in rem*, and the USSR thus had a choice as to whether it wanted to be bound by the terms of Hague I.[71] The USSR continuously failed to abide by the terms of Hague I, and repeatedly declared its intention not to be bound by any treaty that mandated international arbitration.[72] This pattern of behaviour indicates an election not to be bound by the terms of Hague I. Consequently, this means that the USSR was not a signatory to Hague I when it invaded Japanese territory on 9 August 1945. However, it did breach the Kellogg-Briand Pact, seeing that it had acceded to that treaty. Additionally, the USSR could not have lawfully established sovereignty over the Kuril Islands by way of conquest as it was no longer a lawful mode of acquisition of territory at the time of the invasion.

60 ibid.

61 Hague I was confirmed and further expanded in 1907, but its fundamental principles were set out in 1899.

62 Convention for the Pacific Settlement of International Disputes (Hague I) Art 1.

63 General Treaty for Renunciation of War as an Instrument of National Policy, 1928.

64 ibid Art 1.

65 Keith Call, 'Southern Kurils or Northern Territories? Resolving the Russo-Japanese Border Dispute' (1992) Brigham Young University Law Review 753.

66 Pacific Settlement of International Disputes (Hague I) 1899.

67 By the time the Kellogg-Briand Pact had come into effect on 24 July 1929, the Soviet Union had deposited an instrument of ratification of the pact in Washington, indicating its accession to the Pact.

68 The Vienna Convention on Succession of States in Respect of Treaties, Art 2(1)(d).

69 Wallace and Martin-Ortega (n 43) 293–294.

70 ibid.

71 A treaty *in rem* is a treaty that is about a real 'thing' (eg territory).

72 Charles Prince, 'The U.S.S.R. and International Organizations' (1942) The American Journal of International Law 431–435.

One important factor relevant to the question of whether the USSR waged a war of aggression against Japan is whether Michinomiya Hirohito, the Emperor of Japan, had the legal authority to effect a surrender to Allied Powers. If the Japanese Emperor had the legal authority to effect a surrender to the Allied Powers, then the USSR's invasion and occupation of the Kuril Islands between 18 August and 1 September was carried out against a capitulated nation. On 15 August 1945, Hirohito delivered the radio address known as the Jewel Voice Broadcast, in which he informed the public of the Japanese government's acceptance of the Potsdam Declaration.[73] The Potsdam Declaration set out the terms encompassing the unconditional surrender of the Empire of Japan to the Allied Powers.[74]

In 1947, the Constitution of Japan was rewritten, and the role of the emperor was drastically altered.[75] Prior to 1947, the constitution of 1890 known as the Meiji Constitution was in effect, and it is within this document that the Emperor's legal power was codified and set out.[76] In terms of this Constitution, the Emperor was the embodiment of the three branches of state power. [77] The Emperor was held to be 'sacred and inviolable' in terms of this Constitution.[78] This provision in the Meiji Constitution reflected the broader Japanese cultural belief that the Emperor was a direct descendent of two Shinto deities,[79] and he alone ruled Japan by divine right.[80] The legitimacy of his cabinet to govern the people of Japan only came from the fact that he (the Emperor) had consented to the appointment of his cabinet members, who could not hold their office without his express approval.[81] This unique political ideology, informed by Shintoism and Japanese culture, vested supreme authority in the Emperor and was known as *kokutai*.[82]

73 Michinomiya Hirohito, 'Imperial Rescript on the Termination of the War' (1945) Radio address to the nation. English translation of the rescript read out during the radio broadcast available at 'Text of Hirohito's Radio Rescript' (*New York Times*, 15 August 1945) <https://www.nytimes.com/1945/08/15/archives/text-of-hirohitos-radio-rescript.html> accessed 26 September 2019).

74 'Potsdam Declaration: Proclamation Defining Terms for Japanese Surrender' 26 July 1945.

75 The Constitution of Japan 1947, Arts 1–8.

76 The Constitution of the Empire of Japan 1890.

77 Arts 4–6 grants the Emperor executive and legislative authority, as well as the authority to sanction laws.

78 The Constitution of the Empire of Japan 1890, Art 3.

79 In the Shinto religion, which was the state religion of Japan during the Meiji era, the Emperor of Japan was considered a demi-god who directly descended from Amaterasu, the sun goddess, and Susanoo, the storm god.

80 William Beasley, *The Rise of Modern Japan* (3rd edn, Palgrave Macmillan 1990) 80.

81 Robert Hall, *Kokutai No Hongi: Cardinal Principles of the National Entity of Japan* (Harvard University Press 1949) 35.

82 ibid 47.

Article 55 of the Meiji Constitution stated that any imperial rescript (edict) by the Emperor had no legal effect unless it was also signed by a 'minister of state'.[83] It would be apt to describe the document which was read out during the radio broadcast as an imperial rescript.[84] Bix attests to the fact that the transcript read out by the Emperor during his official state broadcast on 15 August 1945 was already signed by his entire cabinet on the evening of 14 August when they met to discuss whether to accept the terms of the Potsdam Declaration.[85] By virtue of the signatures from the members of cabinet, who constitute 'ministers of state' for purposes of article 55 of the Meiji Constitution, this transcript can be considered an imperial rescript and act of state with full legal force.

Considering this, the conclusion of the Japanese Instrument of Surrender on 2 September 1945 between Japan and the Allied Powers arguably constituted a ceremonial surrender. It is likely that surrender was legally affected on 15 August 1945 when the signed imperial rescript was broadcast to the Japanese public, and acceptance of the Potsdam Declaration was communicated to the Allies.[86] It can thus be argued that the Soviet-Japanese War was a lawful war between 9 August and 15 August 1945, if it is accepted that the USSR lawfully terminated the Soviet-Japanese Neutrality Pact. Likewise, all military action taken against Japan after 15 August 1945 could be considered unlawful, including the invasion and occupation of the Kuril Islands between 18 August and 5 September 1945.

## Does Japan Still have a Lawful Claim to the Kuril Islands?

### The Treaty of San Francisco

On 8 September 1951, the State of Japan, as the successor state of the Empire of Japan, signed the Treaty of San Francisco between itself and forty-eight Allies of the Second World War.[87] In terms of this treaty, Japan renounced all 'right, title, and claim to the Kurile [sic] Islands'.[88] The treaty did not, however, recognise the sovereignty of the USSR over the islands. It included a declaration by representatives of the USA that: 'nothing the treaty contains is deemed to diminish or prejudice in favour of the Soviet Union the right, title, and interest of Japan in and to (…) the Kurile [sic] Islands (…) or any other territory, rights or interests possessed by Japan on 7 December 1941, or confer any right, title, or benefit therein or thereto to the Soviet Union.'[89] Whether this declaration had legal force is debatable, but it is possible to interpret it as a protocol supplementing the treaty. This interpretation is substantiated by the fact that it is

83 The Constitution of the Empire of Japan, 1890.

84 Tsuyoshi Hasegawa, *Racing the Enemy: Stalin, Truman, and the Surrender of Japan* (Harvard University Press 2005) 244.

85 Herbert Bix, *Hirohito and the Making of Modern Japan* (Harper Perennial 2000) 558.

86 Richard Frank, *Downfall: The End of the Imperial Japanese Empire* (Penguin Books 1999) 315.

87 Treaty of Peace with Japan (and two declarations) 1951.

88 Chapter II, Art 2(c).

89 Treaty of Peace with Japan (and two declarations) 1951.

included in the text of the treaty document itself. If this reasoning is followed, then it will have full legal force. The fact that the declaration was included only after the treaty had already been signed would suggest that it was intended to supplement the treaty at the very least, or to amend it at the very most. In either case, the declaration would primarily affect the interpretation of Article 2(c) of the treaty. It would be more probable to see the declaration as a supplementary instrument made by a single signatory party, which was subsequently accepted by all other signatory parties. In this case, it would be used as a contextualising framework through which the treaty must be interpreted.[90]

Another related issue is that the USSR refused to sign the Treaty of San Francisco.[91] This fact is significant, because of the principle under international law that treaties only bind signatory members.[92] This has led to the uncertainty of whether Russia can rely on the terms of the Treaty with regards to the territorial dispute between itself and Japan. Treaties are agreements between two or more states, and they can arguably only lawfully create obligations for signatory members, or states which later accede to them.[93] Terms such as Article 2 of the Treaty of San-Francesco are of such a nature that they will inevitably affect non-signatory members as well. The customary legal position regarding terms affecting third parties, namely the *pacta tertiis* rule, and the *res inter alios acta* rule, were not transgressed by the Treaty of San-Francisco. The undertaking by Japan to renounce all territorial claims to the Kuril Islands would not place any obligation on the USSR, nor would it adversely affect the rights of the USSR. It would in fact only benefit the USSR by removing any lawful claim by Japan to the Kuril Islands that could disrupt its exercise of de facto sovereignty over the islands in the archipelago.

**Potential Acquisition of the Kuril Islands by way of Prescription**

A possible argument that Russia could raise is that it has subsequently established sovereignty over the Kuril Islands by way of prescription. Prescription refers to the means by which a state acquires ownership of the territory of another state by exercising de facto sovereignty over it for a long period of time.[94] A key requirement of prescription, however, is that this exercise of de facto sovereignty must be unopposed by the dispossessed sovereign state in whose territory the de facto sovereignty is being exercised.[95] If a state protests the occupation of its territory, then prescription is interrupted.[96] In the *Island of Palmas* case, the Permanent Court of Arbitration was faced with a claim of territorial sovereignty by the USA over the island of Palmas, which was

90 The Vienna Convention on the Law of Treaties, Art 31(2)(b).
91 University of Virginia, 'Studies on the Soviet Union' Volume 3 (Institute for the Study of the USSR. 1963) 143.
92 Wallace and Martin-Ortega (n 43) 275.
93 The Vienna Convention on the Law of Treaties, Art 2.
94 Wallace and Martin-Ortega (n 43 )108–109.
95 ibid.
96 ibid.

being administered by the Netherlands as part of the Dutch East Indies.[97] The court examined the claims of both parties, including questions regarding the right of discovery, contiguity, as well as continuous displays of sovereignty.[98] The court ruled that a title based on contiguity is not recognised under international law; that discovery only grants an inchoate right to the state that discovered the territory; and that actual continuous displays of sovereignty, which are unchallenged by the discoverer will produce a stronger claim to title than that derived from discovery.[99] In the exact words of the court, the 'unchallenged acts of peaceful display of the Netherlands' sovereignty in the periods from 1700 to 1906' proved decisive in this case.[100] In order for Russia to succeed with the argument of prescription, it would have to prove that Japan no longer has any lawful claim to the Kuril Islands, thus rendering any diplomatic protest by Japan null and void.

## Do the Islands Claimed by Japan Form Part of the Kuril Islands?

### Geological and Historical Evidence

The Kuril Islands are a group of volcanic islands that were formed as a result of tectonic subduction of the Pacific Plate beneath the Okhotsk Plate, and they form part of single volcanic arc stretching from Kamchatka to Hokkaido.[101] The Kuril volcanic arc can further be divided into two parallel ridges.[102] The first ridge which includes the islands of Iturup and Kunashir form the 'greater' Kuril chain, and the second ridge which constitutes the island of Shikotan and the Habomai islets form the 'lesser' Kuril chain.[103] An argument could be raised that the 'greater' and 'lesser' Kuril chains differ enough for them to be considered distinct, unconnected groups of islands on two separate geological ridges. The counterargument would be that despite the fact that the islands have formed along two separate ridges, they still constitute part of the same volcanic arc arising from the same subduction zone, and are thus connected.[104] If the former argument is accepted, then the question would be whether the 'greater' or 'lesser' Kuril chain constitutes the 'Kuril Islands' as described in the Treaty of Shimoda, the Treaty of St Petersburg, and the Treaty of San-Francisco, respectively. If the latter argument is accepted, then the 'greater' and 'lesser' Kuril chains would collectively constitute the

97 *Island of Palmas* case (*USA v The Netherlands*) (1928) 2 RIAA.
98 ibid 37.
99 ibid 42.
100 ibid 37.
101 Yuri Taran, 'Gas Emissions from Volcanoes of the Kuril Island Arc (NW Pacific): Geochemistry and Fluxes' (Geochemistry, Geophysics, Geosystems, 2018) <Gas Emissions From Volcanoes of the Kuril Island Arc (NW Pacific): Geochemistry and Fluxes - Taran - 2018 - Geochemistry, Geophysics, Geosystems - Wiley Online Library> accessed 26 September 2019.
102 'International Kuril Island Project' (University of Washington Department of Anthropology, 2001) <IKIP International Kuril Island Project Archaeology, Paleoclimatology, Geology (washington.edu)> accessed 27 September 2019.
103 Yakov Zinberg, 'Kuril Islands' (Max Planck Encyclopaedia of Public International Law 2011) 615.
104 Taran (n 101).

Kuril Islands, as referenced in the above treaties. If Japan insists that the territory it claims does not constitute the Kuril Islands, then the burden of proof lies with Japan to prove that the islands of Iturup, Kunashir, Shikotan, and the Habomai islets form part of a separate geological chain of islands, distinct from the volcanic arc known internationally as the Kuril Islands.

On 19 October 1956, the USSR and Japan signed the Soviet-Japanese Joint Declaration.[105] This Treaty resulted in an offer by the USSR to hand over Shikotan and the Habomai islets to Japan in the event that a peace treaty was concluded at a later stage.[106] The Treaty omitted the islands of Iturup and Kunashir from the offer, and the implication was that the USSR would keep these islands if the USSR and Japan signed a peace treaty in the future. It could be argued that this offer constituted a recognition by the USSR that Shikotan and the Habomai islets do not form part of what is known as the Kuril Islands. Equally, it could also be seen as a recognition that Iturup and Kunashir do form part of the Kuril Islands. Accordingly, it could be argued that as of 1956, the USSR considered the 'greater' Kuril chain to constitute the Kuril Islands, and the 'lesser' Kuril chain to constitute a separate group of islands. It must be remarked, however, that it is unlikely that Joseph Stalin would have intended Shikotan and Habomai islets not to be included as part of the 'Kuril Islands' when he signed the Yalta Conference Agreement on behalf of the USSR in 1945.[107] It is possible that after Stalin's death in 1953, the government of the USSR was simply more willing to compromise with Japan in order to resolve the dispute, and consequently offered them the smaller of the claimed islands as a gesture of diplomatic goodwill. Zinberg notes that the Japanese assertion that the claimed islands do not form part of the Kuril Islands is a position that has only been adopted since October 1961.[108] In support of this position, the Liberal-Democratic Party of Japan (the ruling party of the time) only cited an *aide-mémoire* from September 1956 issued by the USA.[109] Japan's current position thus relies on gathering international support for its territorial claims, in spite of any geological and historical evidence that might undermine the basis upon which its claim rests: that the islands of Kunashir, Iturup, Shikotan, and the Habomai islets do not form part of the 'Kuril Islands' as contemplated in the Treaty of San Francisco.

## Conclusion

In answering the first legal question of whether the Yalta Conference Agreement lawfully gave a right to the USSR to the sovereign territory of Japan in the absence of Japanese consent, reference must be made to several peremptory norms of international law. First, the customary rule of free consent which holds that states can only be bound

105 The Soviet-Japanese Joint Declaration, 1956.

106 ibid Art 9.

107 Tsuyoshi Hasegawa, *Racing the Enemy: Stalin, Truman, and the Surrender of Japan* (2009) 268.

108 Zinberg (n 103) 617.

109 'US Position on Soviet-Japanese Peace Treaty Negotiations' <Foreign Relations of the United States, 1955–1957, Japan, Volume XXIII, Part 1 - Office of the Historian> accessed 17 September 2019.

by the text of treaties which they have freely consented to. Second, the customary rule of *res inter alios acta* which states that the terms of treaties are unlawful insofar as they adversely affect the rights of third parties. Third, the customary rule of *pacta tertiis* which states that no treaty can confer rights, duties, or obligations on third parties. It can thus be concluded that any term in a treaty that creates a right, for a signatory, to the territory of a third-party state is unlawful in so far as it is contrary to these customary norms. When further considering that these peremptory norms existed prior to the adoption of the Vienna Convention, it can be concluded that Section 3 of the 'Agreement Regarding Japan' was unlawful and had no legal effect.

With regards to the second legal question of whether the USSR violated international law by annexing the Kuril Islands, due consideration must be given to the likelihood that Japan breached the Soviet-Japanese Neutrality Pact by continuing to render economic aid to the German Reich after the invasion of the USSR. Consequently, the USSR would not have breached the non-aggression pact by declaring war on Japan on 9 August 1945, due to the prior termination of the non-aggression pact as a result of material breach. The USSR did not breach Hague I as it was not bound to it, but it did breach its obligation in terms of the Kellogg-Briand Pact by declaring war on Japan, and in this respect, it did violate international law. It can also be said that the USSR engaged in acts of aggression when it invaded the Kuril Islands after Japan had already surrendered. Additionally, considering treaty law concluded in the late nineteenth century such as Hague I, as well as treaty law concluded early in the twentieth century such as the Kellogg-Briand Pact, it was concluded that by 1945, conquest was in all probability no longer a lawful means of acquiring territory under international law. Consequently, the USSR could not have lawfully established sovereignty over the Kuril Island by way of conquest.

In answering the third legal question of whether Japan still has a lawful claim to the Kuril Islands, reference must be made to the express inclusion of the declaration into the body of text of the Treaty of San-Francisco at the behest of the USA. This declaration was included prior to the publication of the Treaty, without any formal legal challenges from signatory members. The inclusion of this declaration would strongly suggest it was intended as an instrument to supplement the treaty. Such a declaration amounting to a supplementary instrument means it must be used as a contextualising framework in which the provisions of the treaty must be interpreted. Consequently, section 2(c) of the Treaty of San-Francisco must be interpreted as not to 'diminish or prejudice in favour of the Soviet Union the right, title, and interest of Japan in and to (…) the Kurile [sic] Islands (…) or any other territory, rights or interests possessed by Japan on [ 7 December 1941].' In light of this contextualisation, the text of the Treaty of San-Francisco would imply that Japan did not relinquish all claims it once possessed to the Kuril Islands, and subsequently, the USSR did not establish sovereignty over the Kuril Islands by way of prescription due to Japan's diplomatic protests.

Lastly, with regards to the fourth legal question of whether the islands claimed by Japan do in fact constitute the Kuril Islands, importance must be placed on all available geological and historical evidence. Both the ‘greater’ and ‘lesser’ Kuril chains form part of the same volcanic arc, arising from the same subduction zone between the Okhotsk and Pacific plates. Historically, no legal significance was attached to differences between the ‘greater’ and ‘lesser’ Kuril chains. Whether or not Japan’s claimed territory constitutes part of the Kuril Islands will ultimately depend on whether Japan can discharge the burden of proof placed on it to prove such an assertion.

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